NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ROBERT EDWARD POWELL, Appellant.	2 CA-CR 2006-0129 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20051696

Honorable Nanette M. Warner, Judge

AFFIRMED

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V Á S Q U E Z, Judge.

¶1 After a second jury trial, appellant Robert Edward Powell was convicted of two counts of sexual assault and one count of kidnapping. The charges arose from a single incident which took place at Powell's apartment in June 2004, involving the same victim. On appeal, Powell argues the trial court erred by (1) admitting evidence of a prior attempted sexual assault pursuant to Rule 404(c) of the Arizona Rules of Evidence; (2) excluding character evidence about the alleged victim of the prior assault; (3) excluding evidence of the current victim's prior sexual conduct; (4) rejecting Powell's objections to the state's use of peremptory challenges to strike six male jurors; and (5) denying his motion for a judgment of acquittal on the ground of insufficient evidence. For the reasons discussed below, we affirm.

Facts and Procedural Background

¶2 We view the evidence presented in the light most favorable to sustaining the convictions. *State v. Cropper*, 205 Ariz. 181, ¶ 2, 68 P.3d 407, 408, *supp. op.*, 206 Ariz. 153, 76 P.3d 424 (2003). In June 2004, the victim, Rita L., lived with her adult son at his residence in Tucson. At the time, Bob H. had also been renting a room from Rita's son for two or three months. On the evening of June 18, Rita's sister drove Rita and Bob H. in her van to a local bar to celebrate Bob H.'s birthday. They arrived at the bar at about 7:00 p.m. Although Rita did not usually drink alcohol, she had six glasses of wine in the course of the evening. Around 10:30, Rita recognized Powell, whom she had met and talked with at the bar several times before, and he accepted Rita's invitation to join them. Rita and Powell spent the rest of the evening dancing together, hugging and kissing while they danced. As

Rita, her sister, and Bob H. were leaving the bar at about 1:00 a.m., they offered to drive Powell home. Rita and Powell continued hugging and kissing in the back seat on the way to Powell's apartment, with Powell rubbing Rita's breasts and between her legs over her clothing. Powell told Rita that she was going to spend the night with him, but she responded that she did not know him well enough.

¶3 When they arrived at Powell's apartment, Rita offered to walk him to the door while the other two stayed in the van with the engine running. Powell invited Rita into his apartment, and Rita stepped inside, thinking she would be there only briefly. Once inside, however, Rita turned to see Powell locking the door. When she asked why he had done so, Powell responded, "You're staying all night. . . . We're going upstairs." Rita felt intimidated by him and complied. As Powell followed her up the stairs with his hand on her back, Rita continued to say she wanted to go outside to her sister. Powell directed her into one of the two upstairs bedrooms.

¶4 Once in the bedroom, Powell told Rita to remove her blouse and brassiere. Rita repeated that she "did not want to do this" and that she had to get back to her sister. Powell said he would call Rita's sister using his cell phone and had Rita give him her sister's phone number. After he dialed the number and got no answer, Rita gave Powell Bob H.'s number. When Bob H. answered, Powell handed the phone to Rita. Rita told him that she would be staying with Powell and that he and her sister should leave. Powell was standing right behind her as she spoke on the phone. Bob H. told her to come back to the van, but Rita responded that she was a "big girl" and could take care of herself.

¶5 After Rita ended the call, her sister and Bob H. drove away. Powell then told Rita to finish undressing. Although she complied, she continued to say she did "n[o]t want to do this." Powell ordered Rita to perform oral sex on him, which she did. He then forced her to have sexual intercourse. He attempted anal intercourse but stopped and resumed vaginal intercourse when Rita protested and claimed she had recently had rectal surgery. Afterward, Powell told Rita he had called for a taxi; he then fell asleep. Rita got dressed and waited outside the apartment but, when no taxi arrived, she walked home. The next day, after talking to a friend, Rita called the police, and Powell was subsequently charged with two counts of sexual assault and one count of kidnapping.

¶6 The first trial in November 2005 ended in a mistrial when the jury was unable to reach a verdict on any of the counts. On retrial the following February, a jury found Powell guilty on all three charges, with an aggravating circumstance of emotional harm. At both trials, over Powell's objection, the court permitted the state to present evidence of a prior attempted sexual assault with a number of similarities to the present case. After finding that he had two prior felony convictions, the trial court sentenced Powell to consecutive, enhanced, aggravated prison terms of eighteen years for each of the sexual assault counts, and to a concurrent, enhanced, presumptive term of 15.75 years for the kidnapping conviction.

Discussion

¶7 In this appeal, Powell challenges a number of the trial court's evidentiary rulings. Generally, "[d]ecisions on the admission and exclusion of evidence are 'left to the

sound discretion of the trial court,' and will be reversed on appeal only when they constitute a clear, prejudicial abuse of discretion." *State v. Ayala*, 178 Ariz. 385, 387, 873 P.2d 1307, 1309 (App. 1994), *quoting State v. Murray*, 162 Ariz. 211, 214, 782 P.2d 329, 332 (App. 1989). To the extent Powell also contends the court's rulings violated his constitutional rights to due process and a fair trial, we note that the exercise of these rights at trial is subject to the ordinary rules of evidence, and a defendant's constitutional rights are thus not violated by a trial court's routine application of the Arizona Rules of Evidence. *State v. Dickens*, 187 Ariz. 1, 14, 926 P.2d 468, 481 (1996); *State v. Oliver*, 158 Ariz. 22, 30, 760 P.2d 1071, 1079 (1988).

Admission of Other-Act Evidence

¶8 Powell argues the trial court erred in admitting under Rule 404(c), Ariz. R. Evid., evidence of a prior, uncharged, attempted sexual assault on J. (the "J. incident"). When the J. incident occurred in February 2001, Powell had been drinking with J. at the home of a friend and his wife, Glenda. As the evening progressed, J., a middle-aged woman, and Powell exchanged hugs and kisses. Because both Powell and J. were too intoxicated to drive home, Glenda gave them blankets and pillows so they could sleep on the living room floor. She then went into the bathroom to take a shower. Some minutes later, she heard a scream from the living room and heard J. exclaiming, "You're hurting me!" Leaving the bathroom to investigate, she heard a sound like someone being hit hard on the head and then saw Powell and J. lying naked on the living room floor. J., who was crying and appeared terrified, accompanied Glenda to the bathroom, where she displayed a number of

bruises. J. told Glenda that Powell had demanded oral sex and, when she refused, had become "real rough with her," twisting and pinching parts of her body, attempting to penetrate her anally, and striking the back of her head. Tucson police detective Louis Apodaca subsequently interviewed both J. and Glenda and had J.'s bruises photographed. Because J. had died by the time of Powell's trial in this case, the evidence of the attempted assault on J. consisted of the testimony of Glenda and Detective Apodaca and the photographs of J.'s bruises.

¶9 The trial court had held an evidentiary hearing before the first trial and ruled this evidence admissible, and the court denied Powell's motion for reconsideration of the issue before the second trial. At the same evidentiary hearing, the court also considered and ultimately rejected the state's request to admit evidence of another attempted sexual assault that Powell had committed in 1983, to which he had pled guilty and been sentenced to fifteen years' imprisonment.

¶10 Rule 404(c) allows the admission of "evidence of other crimes, wrongs or acts . . . to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." Before admitting other-act evidence under Rule 404(c),

> a trial judge must make three determinations. First, the trial court must determine that clear and convincing evidence supports a finding that the defendant committed the other act. Ariz. R. Evid. 404(c)(1)(A). Second, the court must find that the commission of the other act provides a reasonable basis to infer that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the charged sexual offense. Ariz. R. Evid. 404(c)(1)(B). Third, the court must find

> that the evidentiary value of proof of the other act is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or other factors mentioned in Rule 403. R[ule] 404(c)(1)(C).

State v. Aguilar, 209 Ariz. 40, ¶ 30, 97 P.3d 865, 874 (2004) (citations omitted).

¶11 As a threshold issue, Powell contends that, because the prior act was an *attempted* sexual assault, it was not a "sexual offense" as defined in Rule 404(c) and therefore should not have been admitted. Under this rule, other-act evidence may only be introduced in a criminal case when a defendant is charged with one of the sexual offenses listed in A.R.S. § 13-1420(C). Rule 404(c)(4). However, contrary to Powell's argument, there is no requirement that the other acts themselves be sexual offenses. *See* Rule 404(c)(4). Because in the present case Powell was charged with sexual assault, a "sexual offense" pursuant to § 13-1420(C), the fact that attempted sexual assault is not listed in the statute did not bar evidence of Powell's prior act under this rule.

¶12 Next, Powell disputes the trial court's finding that the state had proved the J. incident by clear and convincing evidence as Rule 404 requires. He contends that, as in *Aguilar*, the evidence of the prior act consisted only of recitations by third parties, "neither of whom witnessed the attempted sexual assault, but only heard about it afterward from [J]." We disagree. Glenda testified she had heard J.'s screams of "You're hurting me!" and a noise like someone being hit hard on the head, and she had seen J.'s bruises immediately after the assault. Her contemporaneous observations were thus consistent with J.'s claims of sexual assault. In addition, police photographs showing bruises J. allegedly had received during the attempted sexual assault were also admitted in evidence. Thus, we cannot say the

court erred in finding clear and convincing evidence established that Powell had committed the prior attempted sexual assault on J.

¶13 Powell also argues the J. incident was not relevant to show "an aberrant sexual propensity" to commit the offenses in the present case because it was factually unlike the current incident. In particular, he contends the court incorrectly found that both incidents involved violence and a defense of consent. We agree there was no evidence to suggest that the J. incident was a consensual encounter or that Powell had ever characterized it as such. Conversely, there was no evidence of physical violence in the present case.[1] However, the court also found the attacks to be "very similar" because both involved middle-aged women previously known to Powell, there had been physical contact and affection prior to both alleged assaults, and in both instances Powell had attempted sexual intercourse and oral sexual contact.[2] "An exact replication between the charged acts and the uncharged acts is not required to permit the admission of uncharged acts under the emotional propensity exception." *State v. Lopez*, 170 Ariz. 112, 117, 822 P.2d 465, 470 (App. 1991). Thus, the trial court did not abuse its discretion in finding the J. incident relevant to show Powell had an aberrant sexual propensity to commit the present offenses.

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[1]The state accounts for these differences by citing the differing reactions of the victims: because J. resisted, Powell resorted to violence; because Rita did not, Powell did not use violence and consequently was able to claim that she consented. However, because we find the two incidents shared enough other similarities to permit the admission of the J. incident, we do not rely on this argument.

[2]We additionally note that, in both incidents, Powell also attempted anal penetration and the victims were apparently intoxicated.

¶14 Powell next contends the court failed to adequately balance the prejudicial effect of devoting "most of a trial day to evidence of [the J. incident], including inflammatory photographs of a bruised woman," against its probative value. He alleges the court abused its discretion in failing sua sponte to "narrow the evidence" to reduce the danger of unfair prejudice. However, Powell did not object to the admission of the photographs at trial, nor did he ask that the court take any other specific measures to "narrow the evidence." Because a general objection is insufficient to preserve an issue for appeal, Powell has waived this issue absent fundamental error. *State v. Walker*, 181 Ariz. 475, 481, 891 P.2d 942, 948 (App. 1995). Fundamental error is error that goes to the foundation of the case, takes away a right essential to the defense, and is of such magnitude that the defendant could not have received a fair trial. *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). "To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

¶15 "Trial courts have broad discretion in balancing probative value against prejudice, and we will not reverse unless error is clear." *State v. Salazar*, 181 Ariz. 87, 91, 887 P.2d 617, 621 (App. 1994). Powell cites *Salazar* and *State v. Fernane*, 185 Ariz. 222, 226-27, 914 P.2d 1314, 1318-19 (App. 1995), for the proposition that, once a trial court has determined that other-act evidence has sufficient probative value to be admitted, the court should consider both how to limit its use through appropriate jury instructions and whether it can be narrowed "to reduce its potential for unfair prejudice while preserving its probative value." *Fernane*, 185 Ariz. at 226, 914 P.2d at 1318.

¶16 In *Fernane*, the defendant was convicted of child abuse and felony murder for leaving her two-year-old daughter with someone she knew to be dangerous and for failing to get medical attention for the child. 185 Ariz. at 223-24, 914 P.2d at 1315-16. At trial, the state introduced detailed evidence of abuse and injuries to the defendant's two other children resulting in the death of one child and in the other child's being removed from the home and placed for adoption. *Id.* at 225, 914 P.2d at 1317. We found that such detailed evidence—including graphic evidence of severe beatings, many broken bones, and autopsy findings—was "marginally relevant" to establish defendant's knowledge or motive and "highly prejudicial." *Id.* at 227, 914 P.2d at 1319. We reversed the defendant's convictions, concluding that "the trial court erred in failing to narrow the scope of the prior bad acts evidence . . . so as to avoid undue prejudice." *Id.* at 228, 914 P.2d at 1320. Similarly, in *Salazar*, which involved a charge of attempted child molestation, Division One of this court found that "it was wholly unnecessary for the jury to hear that [the] defendant slapped the victim [of a prior sexual assault], raped her twice, and silenced her by holding a sawed-off shotgun to her head." 181 Ariz. at 92, 887 P.2d at 622.

¶17 But, in contrast to those cases, the record in the present case does not support a conclusion that the details of the other acts were "not particularly probative of anything," *Fernane*, 185 Ariz. at 226, 914 P.2d at 1318, or that the state's "conspicuous purpose with th[e] evidence was to luxuriate in inflammatory detail and create overwhelming prejudice" against Powell, *Salazar*, 181 Ariz. at 92, 887 P.2d at 622. The evidence the state introduced here was no more than necessary to establish that the prior attempted sexual

assault took place and shared key characteristics with the charged offenses. The photographs of J.'s bruising served the permissible purposes of corroborating and illustrating witness testimony. And, "[w]hile it may be true that the subject-matter of a photograph can be described adequately with words, that is not the test of admissibility." *State v. Castaneda*, 150 Ariz. 382, 391, 724 P.2d 1, 10 (1986). *See State v. Huey*, 145 Ariz. 59, 61, 699 P.2d 1290, 1292 (1985) (approving use of photographs to illustrate witness testimony about prior acts). Furthermore, as Powell acknowledges, the court did give an appropriate, limiting jury instruction. We thus find the court committed no error, much less the fundamental, prejudicial error required for reversal, in admitting evidence of the J. incident.

¶18 Powell argues for the first time on appeal that the court's findings were inadequate because they failed to give "a specific indication of why the elements [of the rule] were satisfied, as required by Rule 404(c)." Because Powell failed to raise this objection at trial—indeed, he expressly praised the court's minute entry for "carefully follow[ing] the framework for [Rule] 404(c) analysis in allowing the [J.] evidence"—we review for fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 24, 115 P.3d at 608; *Elliott v. Elliott*, 165 Ariz. 128, 134, 796 P.2d 930, 936 (App. 1990) (failure to object to inadequate findings at trial constitutes waiver).

¶19 Rule 404(c) requires the trial judge "to make *specific* findings" indicating why it found that each of the three prerequisites for admission under the rule had been satisfied. *State v. Aguilar*, 209 Ariz. 40, ¶¶ 30, 36, 97 P.3d 865, 874, 875 (2004). Powell relies on

Aguilar, a sexual assault case involving the trial court's admission of other nonconsensual sexual acts allegedly committed by the defendant. 209 Ariz. 40, ¶ 34, 97 P.3d at 874. In that case, our supreme court concluded that the trial court's findings did not meet the specificity requirement of Rule 404(c)(1)(D) because the trial court found the prior act was supported by clear and convincing evidence without making "a credibility determination that the victims' accounts of the assaults were more credible than [the defendant]'s." *Id.* ¶ 35. Here, however, as Powell observes, "neither witness to the [J.] incident testified that Powell claimed consent." Thus, there was no need for the court to weigh Powell's credibility against that of the witnesses. And, although the court's findings pursuant to Rule 403(c)(1)(A)—that Glenda was a credible witness, despite her admitted memory problems, and that the J. incident was therefore proved by clear and convincing evidence—border on being conclusory,[3] the record contains "substantial evidence that the requirements of admissibility were met." *Aguilar*, 209 Ariz. 40, ¶ 37, 97 P.3d at 875. Specifically, during the evidentiary hearing, the trial court considered the photographic evidence of J.'s injuries as well as the testimony of Glenda and Detective Apodaca. Thus, if there was error, it did not approach the level of fundamental, reversible error. *See id.* (insufficient findings may be harmless if record shows admissibility requirements met).

¶20 The court's finding in relation to Rule 403(c)(1)(B)—that "[t]he commission of the assault on [J.] provides a reasonable basis to infer that the defendant had a character

[3]Although the court acknowledged that Glenda had admitted problems with her memory, we note that it made no contrary findings supporting her reliability as a witness.

trait giving rise to an aberrant sexual propensity to commit the crime charged"—appears similarly conclusory. However, combined with the court's subsequent findings pursuant to Rule 403(c)(1)(C) detailing its reasons for admitting evidence of the J. incident, including the similarities with the charged assault and the fact that Powell was out of custody for only nine months between the two incidents, the court provided adequate findings with respect to both Rule 403(c)(1)(B) and (C). *See State v. Lopez*, 170 Ariz. 112, 117, 822 P.2d 465, 470 (App. 1991) (similar, recent acts of sexual misconduct admissible to show emotional propensity for sexual aberration); *In re Maricopa County Juv. Action No. J-90454*, 137 Ariz. 59, 61, 668 P.2d 902, 904 (App. 1983) (minute entry may be read as a whole, regardless of specific headings, to determine whether trial court considered appropriate factors).

Evidence of J.'s Bruising

¶21 In a related argument, Powell contends the trial court denied him his right to present a defense by precluding evidence that J.'s bruises could have been caused in a different manner, and not by him. The court precluded the proposed testimony of Powell's witness, Lisa Sinclaire, the manager of J.'s apartment complex, that J. was habitually intoxicated and that Sinclaire had seen her fall on two occasions.

¶22 When a trial court admits other-act evidence under Rule 404(c), a defendant generally "has the right, as a matter of due process, to present relevant evidence challenging its validity and reliability." *State v. Speers*, 209 Ariz. 125, 130, 98 P.3d 560, 565 (App. 2004). However, the introduction of such rebuttal evidence is still subject to the

requirement of Rule 403, Ariz. R. Evid., that its probative value not be "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The latter part of this rule is aimed at avoiding the danger that,

> "in attempting to dispute or explain away the evidence thus offered, new issues will arise as to the occurrence of the instances and the similarity of conditions, new witnesses will be needed whose cross-examination and impeachment may lead to further issues; and that thus the trial will be unduly prolonged, and the multiplicity of minor issues will be such that the jury will lose sight of the main issue, and the whole evidence will be only a mass of confused data from which it will be difficult to extract the kernel of controversy."

State v. Gibson, 202 Ariz. 321, ¶ 17, 44 P.3d 1001, 1004 (2002), *quoting* 2 *Wigmore on Evidence* § 443, at 528-29 (Chadbourn rev. 1979). The greater the probative value of the evidence and the more significant the issue for which it is offered, the lower the probability that the risk of confusion or waste of time will substantially outweigh the factors favoring its admissibility. *Id.*

¶23 In the present case, Powell sought to use Sinclaire's testimony to supply an alternative explanation for J.'s bruises. Sinclaire testified outside the presence of the jury that she had seen J. "almost daily" for four to six months and that the only time she had seen her sober was when J. had initially rented the apartment. However, Sinclaire had only seen J. fall twice, once in January 2001 and on another occasion several months earlier. The court found the evidence that J. had a drinking problem was irrelevant to the alleged assault and further found there was no possibility that the bruises observed by Glenda and

photographed by the police in late February and early March could have resulted from the fall Sinclaire had witnessed over a month earlier.[4] It thus precluded Sinclaire from testifying at trial, on the grounds of unfair prejudice and inadmissible character evidence.

¶24 We agree with the trial court's assessment that Sinclaire's testimony was of little probative value and approve the court's decision to preclude it. Additionally, allowing Sinclaire to testify would have invited additional extraneous evidence—expert medical testimony distinguishing J.'s bruises from bruising consistent with a fall, contradictory character evidence from witnesses who had observed J. when she was sober, and testimony from witnesses who had seen J.'s body without bruises before the assault. Furthermore, Sinclaire's testimony was offered to rebut only one component of the state's evidence that Powell had assaulted J., and the jury was instructed that such other-act evidence "[did] not lessen the State's burden of proving guilt [in this case] beyond a reasonable doubt." The negligible probative value of Sinclaire's proposed testimony was substantially outweighed by the risk of confusion and waste of time, and it was therefore properly excludable pursuant to Rule 403.

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[4]On appeal, Powell cites two civil "slip and fall" cases for the proposition that "evidence of the existence of a particular fact before or after an act in question, or of other similar accidents at or near the place of the injury, may be shown to indicate the existence of that same condition or happening at the time of the act or accident." However, not only did these cases deal with entirely different facts than the present case, they emphasized that such evidence must not be "too remote in point of time," *Slow Dev. Co. v. Coulter*, 88 Ariz. 122, 125, 353 P.2d 890, 892 (1960), and found an interval of around forty days between two incidents rendered such evidence "too remote to have any probative value whatever," *Montgomery Ward & Co. v. Wright*, 70 Ariz. 319, 322, 220 P.2d 225, 227 (1950).

Evidence of Victim's Prior Sexual Conduct

¶25 Powell argues the trial court erred in excluding testimony about prior acts of sexual intercourse between Rita and Bob H. Generally, such testimony would be inadmissible under Arizona's "rape shield" law, A.R.S. § 13-1421(A). *See State v. Gilfillan*, 196 Ariz. 396, ¶ 15, 998 P.2d 1069, 1073-74 (App. 2000). However, evidence of instances of a victim's prior sexual conduct are admissible when "the evidence is relevant and is material to a fact in issue in the case[,] . . . the inflammatory or prejudicial nature of the evidence does not outweigh the probative value of the evidence, [and the evidence] supports a claim that the victim has a motive in accusing the defendant of the crime." § 13-1421(A)(3). Relying on *Olden v. Kentucky*, 488 U.S. 227 (1988) (per curiam), Powell argues that Rita's previous sexual relationship with Bob H. gave her a motive to claim that sex with Powell was not consensual and thus should have been admitted.

¶26 In *Olden*, the victim was involved in an extramarital relationship with a man who saw her get out of a car in which she had been riding with the defendant, whom she accused of raping her. 488 U.S. at 228. By the time of trial, the victim and her paramour had separated from their spouses and were living together. *Id.* at 229-30. The trial court had excluded all evidence of their cohabitation, and the Kentucky Court of Appeals had affirmed, finding that, although such evidence was relevant and not barred by the state's rape shield law, its probative value was outweighed by the possibility for prejudice because the victim was white and her boyfriend was black. *Id.* at 230-31. The United States Supreme Court reversed the conviction, finding "[s]peculation as to the effect of jurors' racial biases

cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of [the victim's] testimony." 488 U.S. at 232.

¶27 Here, however, the trial court found that evidence of Rita's sexual relationship with Bob H. did not "under [§] 13-1421(A)(3), present or support a claim that the victim ha[d] a motive" for lying. The court also concluded that any probative value such evidence might have was substantially outweighed by its prejudicial nature. At the hearing on Powell's motion to admit the evidence, Bob H. conceded having had sex with Rita once or twice "or maybe a little more." But he characterized their relationship as "just friends," testified that the last time they had had sex was two months prior to the assault, and strenuously denied having been jealous over Rita's behavior with Powell on the night of his birthday party. He stated he had been reluctant to let Rita walk Powell to his apartment, not out of jealousy but "because she's a real good friend of mine and she was under the influence [of] alcohol and she's not that type of lady," and he was concerned she might do something she would later regret.

¶28 None of the testimony supported Powell's theory that Rita had flirted and engaged in consensual sex with Powell to make Bob H. jealous and that she subsequently fabricated the sexual assault charge because she regretted her behavior. Powell did not call Rita as a witness at the evidentiary hearing, and the record is therefore silent about whether her perspective of her relationship with Bob H. might have supported Powell's theory. Thus, this case is more analogous to *Freeman v. Erickson*, 4 F.3d 675, 679 (8th Cir. 1993), in which the Eighth Circuit Court of Appeals upheld the trial court's exclusion of similar

evidence, finding that "extensive *in camera* hearings afforded [the defendant] every opportunity to establish the relevancy of his inquiry into the victim's past sexual conduct. Unlike the defendant in *Olden*, [the defendant in *Freeman*] failed to establish that the victim was seriously involved with . . . a jealous boyfriend."

¶29 Furthermore, the trial court did not preclude Powell from eliciting testimony about the general nature of Rita's relationship with Bob H., or from asking either of them questions to support his theory that Rita had been attempting to make Bob H. jealous with her behavior on the evening of the assault. However, he failed to pursue such questioning. *See State v. Harris*, 151 Ariz. 236, 237, 727 P.2d 14, 15 (1986) (defendant who chose not to pursue line of questioning on particular issue not prevented from presenting defense based on that issue). Therefore, given the lack of any evidence to support Powell's theory, we conclude the trial court did not err in excluding evidence of Rita's prior sexual conduct, and its application of the rape shield statute did not violate Powell's constitutional rights to present relevant evidence, confront adverse witnesses, and present a defense. *Gilfillan*, 196 Ariz. 396, ¶¶ 20-23, 998 P.2d 1069, 1075-76.

Jury selection

¶30 Relying on *Batson v. Kentucky*, 476 U.S. 79 (1986), Powell next argues the trial court erred by rejecting his objections to the state's use of peremptory challenges to strike six male jurors. A party may not exercise a peremptory strike on the basis of gender. *State v. Purcell*, 199 Ariz. 319, ¶ 22, 18 P.3d 113, 119 (App. 2001); *see also J.E.B. v. Ala.*, 511 U.S. 127, 146 (1994).

¶31 A defendant raises a *Batson* objection by first making a prima facie showing that a peremptory challenge has been exercised on discriminatory grounds. *Miller-El v. Cockrell*, 537 U.S. 322, 328 (2003). "Second, if that showing has been made, the prosecution must offer a [gender]-neutral basis for striking the juror[s] in question. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Id.* at 328-29. On review, we must sustain the trial court's ruling "unless it is clearly erroneous." *Snyder v. Louisiana*, ___ U.S. ___, ___, 128 S. Ct. 1203, 1207 (2008).

¶32 The trial court here appeared uncertain whether *Batson* applied to challenges based on gender. However, it stated that, "[i]f a male is on trial, they're entitled to have a non-gender based reason for strike" and then effectively proceeded to the next part of the *Batson* test by offering the state the opportunity to make a record on its reasons for the strikes. *See Hernandez v. New York*, 500 U.S. 352, 359 (1991) (plurality opinion) ("Once a prosecutor has offered a . . . neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot.").

¶33 Powell argues the state did not provide "sufficiently neutral" reasons for its strikes. First, although the prosecutor specified she struck one of the jurors for not paying attention to her questions; a second juror because he watched immature television shows;

and a third because he was young, single, and childless,[5] Powell contends she failed to provide explanations for the remaining three strikes. But the record clearly shows the prosecutor explained that she struck one of the remaining jurors because he had a DUI conviction, another because he did not drink alcohol, and the third because she believed he would not be attentive during trial.

¶34 Next, Powell challenges specifically the two strikes made "on a claim of inattentiveness without [any] additional reason."[6] However, we reject his contention that particular facts are necessary to support a claim of inattentiveness; a prosecutor may rely on demeanor alone in exercising a strike. *See Snyder*, 128 S. Ct. at 1209. "[N]eutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention)," and we defer to the trial court's determination of "whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." *Id.* at 1208.

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[5]We are not persuaded by Powell's argument that similarly situated female jurors were not struck. As we have previously noted, "[t]he dynamics of the jury selection process make it difficult, if not impossible, on a written appellate record to evaluate or compare the challenge of one prospective juror with the retention of another person who on paper appears to be substantially similar." *State v. Hernandez*, 170 Ariz. 301, 305, 823 P.2d 1309, 1313 (App. 1991). And, insofar as we are able to make such a comparison, we note that one of the two young, unmarried female jurors who was retained was a social worker and the other was a television meteorologist with nine years' experience. Thus, their professional qualifications and employment history do not suggest a similar lack of maturity.

[6]Although he contends that four of the six male jurors were struck for this reason, the record does not support this claim.

¶35 Powell correctly points out that a trial court need not accept the explanations offered by the state for striking jurors. *See Purkett v. Elem*, 514 U.S. 765, 768 (1995). Here, however, the court implicitly accepted the state's reasoning when it rejected Powell's claim that the strikes were based on gender.[7] *See State v. Canez*, 202 Ariz. 133, ¶ 28, 42 P.3d 564, 578 (2002). Furthermore, all the other grounds cited by the state have been upheld by other courts as valid, nondiscriminatory reasons for striking a prospective juror. *See id.* ¶ 26 (prior criminal history); *Rice v. Collins*, 546 U.S. 333, 336 (2006) (youth and marital status); *State v. Sanderson*, 182 Ariz. 534, 541, 898 P.2d 483, 490 (App. 1995) (age, marital status, employment, and consumption of alcohol). Thus, the trial court did not err in finding Powell failed to meet his burden of proving purposeful discrimination.

Sufficiency of the Evidence

¶36 Finally, Powell argues there was insufficient evidence to support his conviction and the trial court thus erred in denying his motion for a judgment of acquittal under Rule 20, Ariz. R. Crim. P. We review the facts in the light most favorable to sustaining the jury's verdict, *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 914 (2005), and we will not reverse a trial court's decision on a claim of insufficient evidence "if substantial evidence supports it," *State v. Panveno*, 196 Ariz. 332, ¶ 22, 996 P.2d 741, 744 (App. 1999).

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[7]We note that the United States Supreme Court issued its most recent *Batson* decision during the pendency of this appeal. *Snyder v. Louisiana*, ___ U.S. ___, 128 S. Ct. 1203 (2008). That case is distinguishable because there the state proffered one clearly invalid reason for the strike. Thus, in the absence of findings, the Court was unable to presume that the trial judge had based his ruling on the juror's demeanor, which was also raised by the state. *Id.* at 1207.

"'Substantial evidence' exists if reasonable persons may fairly differ as to whether certain evidence establishes a fact in issue." *Id.*

¶37 Although Powell complains "there was a paucity of evidence to support a claim of nonconsensual sex," we note that

> [a] conviction may be had on the basis of the uncorroborated testimony of the [victim] unless the story is physically impossible or so incredible that no reasonable person could believe it. It is the function of the jury to determine whether the testimony of the [victim] is such as to make the story credible or reasonable.

State v. Williams, 111 Ariz. 175, 177-78, 526 P.2d 714, 716-17 (1974) (internal citation omitted). In the present case, Rita's account was neither physically impossible nor incredible. Furthermore, the jury heard the very objections Powell now makes on appeal: that Powell's brother, who was asleep in an adjoining bedroom at the time of the assault, heard nothing unusual; that the forensic evidence could be explained by consensual sexual relations; and that the timeline Rita offered to account for what happened after she arrived at Powell's apartment was not internally consistent. Having heard all the evidence, the jury apparently concluded that Rita was a credible witness. It is the role of the jury to make such credibility determinations. *State v. Dickens*, 187 Ariz. 1, 21, 926 P.2d 468, 488 (1996). Because reasonable minds could differ on the inferences to be drawn from the evidence, the evidence was substantial, and the trial court properly denied Powell's Rule 20 motion. *Id.; State v. Landrigan*, 176 Ariz. 1, 5, 859 P.2d 111, 115 (1993).

Disposition

¶38 For the reasons stated above, we affirm.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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PHILIP G. ESPINOSA, Judge